Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARICOPA-STANFIELD IRRIGATION AND DRAINAGE DISTRICT, A MUNICIPAL CORPORATION OF THE STATE OF ARIZONA; CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT, A MUNICIPAL CORPORATION OF THE STATE OF ARIZONA; NEW MAGMA IRRIGATION & DRAINAGE DISTRICT, A MUNICIPAL CORPORATION OF THE STATE OF ARIZONA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

[Names Of Counsel Appear on Inside Front Cover]

January 12, 1999

138 pp

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QUESTIONS PRESENTED

(1) Where the Secretary of the Interior, under § 5 of the Boulder Canyon Project Act, allocates Colorado River water from the Central Arizona Project to individual Indian tribes, municipal and industrial users, and non-Indian agricultural users, in that order of priority, and contracts with non-Indian agricultural users for specified percentages of the total supply remaining after the senior allocations have been satisfied:

(a) May the Secretary subsequently increase the allocation to an Indian user, thereby reducing the water available under the junior users' contracts, without liability to those users?

(b) May the Secretary do so without liability if the reallocation is directed by Congress at the Secretary's request?

(2) Does a contract clause providing that the United States "assumes no responsibility with respect to the quantity of water available for delivery" excuse the government from liability where the government determines to reallocate the water to another user?

(3) Does water allocated "to the Central Arizona Project" in a statutory settlement of non-Indian CAP users' claims to other water used to settle Indian claims against the United States inure to the benefit of the non-Indian users under the Secretary's CAP allocations and implementing contracts?

(4) Is the Ninth Circuit's application of the "unmistakability doctrine" to absolve the government from liability when Congress reallocates previously contracted-for water to another user consistent with this Court's decision in *United States v. Winstar*, 518 U.S. 839 (1996)?

RULE 29.6 LISTING

All of the parties are listed on the cover. None of the petitioners have parent companies or subsidiaries.

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Petitioners Maricopa-Stanfield Irrigation and Drainage District, Central Arizona Irrigation and Drainage District, and New Magma Irrigation & Drainage District respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 158 F.3d 428 (9th Cir. 1998) and is reprinted at App. A.[1] The opinion of the United States District Court for the District of Arizona is unreported and is reprinted at App. C. The order of the Court of Appeals granting interlocutory review is unreported and appears at App. B.[2]

JURISDICTION

The Ninth Circuit entered its decision on October 14, 1998. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of § 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d, are reprinted at App. D.

The relevant sections of the Colorado River Basin Project Act, 43 U.S.C. §§ 1501, 1521(a) and (b), and 1524(b) are reprinted at App. E.

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[1] References to "App. ___" are to the appendix filed with this petition.

[2] The court of appeals issued its original opinion reversing the district court on July 7, 1998. The Districts then filed a petition for rehearing and suggestion for rehearing *en banc*. The court did not specifically rule on the Districts' petition or suggestion for rehearing *en banc*. However, the court withdrew its original opinion and substituted the revised opinion on October 14, 1998.

The relevant sections of the Ak-Chin Settlement Act of 1984, Pub. L. No. 98-530, §§ 2(a), (b), (c), (f), and (k), 98 Stat. 2698-2700, 2701 (Oct. 19, 1984) are reprinted at App. F.

The relevant sections of the San Carlos Apache Tribe Water Rights Settlement Act, Pub. L. No. 102-575, §§ 3704(a), 3708(f), 106 Stat. 4740, 4742-43, 4749 (Oct. 30, 1992), are reprinted at App. G.

The Secretary of the Interior's Central Arizona Project, Arizona; Water Allocations and Water Service Contracting; Record of Decision, 48 Fed. Reg. 12447 (Mar. 24, 1983) is reprinted in full at App. H.

The relevant sections of the Bureau of Reclamation's Subcontract Among the United States, the Central Arizona Water Conservation District, and the Maricopa-Stanfield Irrigation District Providing for Water Service, Central Arizona Project (Nov. 21, 1983) ("Subcontract") are reprinted at App. I.

The relevant sections of the Bureau of Reclamation's Contract Between the United States and the Central Arizona Water Conservation District ("CAWCD") for Delivery of Water and Repayment of Costs of the Central Arizona Project (amended Nov. 28, 1988) are reprinted at App. J.

STATEMENT OF THE CASE

Introduction. This case involves the question whether the federal government is liable for damages when the Secretary of the Interior ("Secretary"), acting pursuant to his authority to allocate Colorado River water under § 5 of the Boulder Canyon Project Act of 1928 ("BCPA"), contracts with one user for the provision of water and later reduces the quantity of water available under that contract by reallocating that water to another user. The district court answered that question in the affirmative. The Ninth Circuit, however, reversed, holding

essentially (1) that the Secretary retained virtually unlimited authority to reallocate previously contracted-for Colorado River water and (2) that no such reallocation could subject the government to liability for damages unless both the Secretary's and Congress' reallocation authority had been relinquished in "unmistakable terms." App. A at 20a-21a.

Petitioners are three Arizona irrigation districts, municipal corporations formed to distribute water within their respective service areas (the "Districts"). The Districts contracted with the Secretary to receive, on an annual basis, fixed percentages of a residual pool of water developed by a federal system of dams, reservoirs, and aqueducts, known as the "Central Arizona Project" ("CAP"), and designed to supply Colorado River water to central Arizona. Respondent is the United States, which through the Secretary, has constructed the CAP and agreed to provide the water under the Districts' contracts.

1. The Boulder Canyon Project Act of 1928. This Court held in *Arizona v. California* that in § 5 of the BCPA, Congress had given the Secretary broad authority "both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States [Arizona, California, and Nevada] and to decide which users within each State would get water." 373 U.S. 546, 580 (1963)[3]. With respect to contract entitlements for

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[3]Congress enacted the BCPA to provide a federal solution to serious and long-standing Colorado River water problems. The BCPA ratified the Colorado River Compact, which had divided the river basin into an "Upper Basin" (Colorado, New Mexico, Utah, and Wyoming) and a "Lower Basin" (Arizona, California, and Nevada), and apportioned to each Basin the right to consume 7.5 million acre-feet of Colorado River water annually. 43 U.S.C. § 617*l*. Section 1 of the BCPA authorized the Secretary to "construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River." 43 U.S.C. § 617. Section 5 authorized the Secretary "to

(continued...)

individual users, the Court held that the Secretary had discretion to choose with whom and under what terms to contract, and that in so doing, "is not bound . . . to follow state law." *Id.* at 586. Before now, this Court has had no opportunity to delineate further the contours of the Secretary's or Congress' authority with regard to the allocation of the waters of the Colorado River among contracting parties within each state.

2. The Colorado River Basin Project Act of 1968. In 1968, Congress passed the Colorado River Basin Project Act ("CRBPA"), 43 U.S.C. §§ 1501 *et seq.*, which authorized the Secretary to construct the CAP to enable Arizona users to put to beneficial use that portion of Arizona's annual apportionment of Colorado River water not previously allocated. Like the BCPA, the CRBPA did not specifically define the Secretary's authority to determine who would be permitted to contract for CAP water. In 1972, pursuant to the CRBPA, the Secretary entered into a Master Repayment Contract ("Master Repayment Contract") with the Central Arizona Water Conservation District ("CAWCD"), a public entity created by the State of Arizona to contract with the United States for delivery of the CAP's water supply and to repay Arizona's share of the project costs.[4] Pursuant to the CRBPA and the Master Repayment Contract, the Secretary and the CAWCD were to enter into subcontracts with Arizona municipal and industrial users and non-Indian agricultural users for the CAP supply. 43 U.S.C.

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[3](...continued)
contract for the storage of water . . . and for the delivery thereof . . . for irrigation and domestic uses," and provided that "[n]o person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract [with the Secretary]." 43 U.S.C. § 617d, App. D at 49a.

[4]See 43 U.S.C. § 1524(b), App. E at 53a-54a; Master Repayment Contract (included in the record below in the Appellant's Excerpt of Record at 129), App. J at 94a-95a.

§ 1524(b), App. E at 53a-54a. The Secretary alone would contract with Indian tribes for their allocated shares of CAP water. See *id.*

3. The Secretary's 1983 Allocation Decision. The Secretary decided to determine systematically in advance how CAP water should be allocated and who specifically should have the opportunity to contract, and for this task the Secretary requested recommendations from the State of Arizona as to how the CAP supply should be allocated among non-Indian users. In 1983, the Secretary issued a Final Water Allocation Decision "to allocate waters developed by the . . . (CAP) and to proceed with water service contracting with Indian and non-Indian users for the delivery of Arizona's remaining entitlement to Colorado River water." App. H at 61a. The decision made specific, individual, allocations of water, totaling 309,828 acre-feet, to twelve Indian tribes, based upon careful analysis of the water actually needed by each tribe. *Id.*; see also Central Arizona Project, Arizona; Allocation of Project Water for Indian Irrigation Use, 41 Fed. Reg. 45883 (Oct. 18, 1976). Next, accepting the state's recommendation, the Secretary allocated specific quantities of water, totaling 640,000 acre-feet, to eighty-five municipal and industrial ("M&I") users. App. H at 71a. Finally, also in accordance with the State's recommendations, the Secretary allocated fixed percentages of all "remaining supplies" to twenty-two non-Indian agricultural users, including the Districts.[5] *Id.* While the Secretary retained jurisdiction over "water not contracted for, or contracted for but not expected to be utilized during interim periods," *id.* at 62a,

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[5]The Secretary's Allocation Decision specified that in times of water shortage, deliveries to Indian tribes would be given the highest priority, then M&I deliveries, followed by non-Indian agricultural users, which would be the first group to experience curtailment in times of drought or shortage.

the Secretary did not otherwise reserve authority to amend the 1983 allocations.

4. The Districts' Contracts. Within months, the Districts and other allottees under the Secretary's decision entered into long-term contracts to secure their rights to the allocated water.[6] In accordance with the Secretary's decision, the Districts contracted to receive specified percentages of "the total supply of Agricultural Water available for delivery from the Project." Subcontracts ¶ 4.13(a), App. I at 90a.[7] The Secretary specifically committed to "use all reasonable diligence to make available to the [Districts] the quantity of Project Water requested under their contracts, and affirmed that the government would "use [its] best efforts to maximize the availability and delivery of Arizona's full entitlement of Colorado River water over the term of this subcontract." Subcontracts ¶¶ 4.1, 4.4(b)(i), App. I at 88a, 89a-90a. In exchange for and in reliance on these commitments, the Districts undertook very substantial financial obligations, obviously

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[6] *E.g.*, Subcontract Among the United States, the Central Arizona Water Conservation District, and the Maricopa-Stanfield Irrigation & Drainage District Providing for Water Service, Central Arizona Project, ¶ 4.13(a) (Nov. 21, 1983) ("Subcontract"). The Districts' subcontracts are identical in all relevant respects. Relevant provisions are set forth at App. I.

[7] "Agricultural water" is defined in the Master Repayment Contract as "project water used primarily in the commercial production of agricultural crops or livestock, including domestic use incidental thereto, on tracts of land operated in units of more than 5 acres." § 5.12, App. J at 94a. Under the Secretary's Allocation Decision, the "total supply of Agricultural Water available" in a given year was to consist not only of the excess of the total expected CAP supplies over the amounts allocated to specific Indian tribes and M&I users, but also any water allocated to a tribe or M&I contractor that that contractor did not actually use in that year." App. H at 80a.

relying on the quantity of water for agricultural production to which they would be entitled under their subcontracts.[8]

5. The Ak-Chin Settlement Act of 1984. Shortly after the Districts' and other allottees' contracts were signed, the Secretary reached an agreement with the Ak-Chin Indian Community of central Arizona to amend an earlier statutory commitment that the government had made to the community. Under the Ak-Chin Settlement Act of 1978, the government was obligated to provide the Ak-Chin with an interim water supply by 1984 and a permanent water supply of 85,000 acre-feet per year by 2003. Under the negotiated compromise, which became the Ak-Chin Settlement Act of 1984 ("Ak-Chin Settlement Act"), the Ak-Chin would accept a somewhat lesser amount of water in exchange for receiving their permanent supply by 1988. § 2(c), 98 Stat. 2699, App. F at 55a-56a.

The Secretary proposed to satisfy this compromise commitment to the Ak-Chin through two sources: (1) a portion -- 50,000 acre-feet -- of the Colorado River water for which the Yuma-Mesa Irrigation and Drainage District ("Yuma-Mesa") had contracted in 1956 but which it had never developed or used, and (2) the water -- 58,300 acre-feet -- that had been

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[8]The subcontracts obligated the Districts to pay substantial operation and maintenance charges for the backbone CAP facilities, in addition to a substantial annual "agricultural subcontract charge," of approximately $215,000, to be paid annually until the CAP facilities were completed, and credited against later per-acre-foot capital charges. Subcontracts ¶ 5.1, 5.2(a), (c)-(d), App. I at 91a-93a. Finally, each District was required to execute a construction contract with the Secretary, under which it was (and is) obligated to repay the entire cost of the distribution system that would be used to serve it, at a total cost of hundreds of millions of dollars. See, e.g., Contract Between the United States and the Central Arizona Irrigation and Drainage District providing for Construction of a Water Distribution System, Central Arizona Project (Nov. 21, 1983) (included in the Appellees' Supplemental Excerpt of Record on Appeal at 147).

allocated to the Ak-Chin in the Secretary's 1983 Allocation Decision. This portion of the Secretary's proposal, however, created a problem: Arizona had included the 50,000 acre-feet of unused Yuma-Mesa water in its CAP allocation recommendations which the Secretary had accepted and incorporated into his 1983 Allocation Decision; and other users, including the Districts and other non-Indian agricultural users, consequently believed that the unused Yuma-Mesa water was part of the pool already committed to them under their recent CAP contracts. See, *e.g.*, Letter from Governor Bruce Babbitt to Secretary James Watt, dated Nov. 1, 1983 (included in the Appellant's Excerpts of Record at 334-35). The Secretary disagreed, contending that the 50,000 acre-feet at issue had not been included in the CAP allocations and was not committed under existing contracts. See, *e.g.*, Letter from Secretary James Watt to Congressman Morris D. Udall, dated Oct. 7, 1983, at 6 (included in the Appellant's Excerpts of Record at 328-33).

When the Secretary's proposed compromise was presented to Congress, Arizona Senators Barry Goldwater and Dennis DeConcini negotiated and included an amendment to settle the dispute between the non-Indian CAP users and the Secretary over the Secretary's right to reallocate 50,000 acre-feet of water to the Ak-Chin. See 130 Cong. Rec. S11837-38 (daily ed. Sept. 25, 1984) (included in Appellees' Supplemental Excerpt of Record on Appeal at 95). The amendment specified that whenever the aggregate water supply available from these proposed sources exceeded the quantity to which the Ak-Chin were entitled under the 1984 Act (which it generally would, by approximately 33,300 acre-feet), "the Secretary shall allocate on an interim basis *to the Central Arizona Project* any of the water . . . which is not required for delivery to the Ak-Chin Indian Reservation under this Act." § 2(k), 98 Stat. 2701, App. F at 57a (emphasis added).

The amendment thus settled the dispute over rights to the 50,000 acre-feet of Yuma-Mesa water by allowing the Secretary to increase the water allocated to the Ak-Chin, but explicitly confirming that the 33,300 acre-feet of the 1983 Ak-Chin CAP allocation which the Ak-Chin were relinquishing in the Settlement Act would be committed (when available, allowing for low-water or drought conditions) to the CAP. Under the CAP allocation and contract structure adopted by the Secretary a few months earlier, this meant that the water would inure to the benefit of non-Indian agricultural users, except in a dry year when it might be needed to satisfy higher priority commitments to the Ak-Chin or the M&I users. Confirming the necessary impact of the Ak-Chin compromise, the Secretary's Master Repayment Contract with the CAWCD, as amended in 1988, explicitly defined the "Project water" to be delivered pursuant to that contract and the subcontracts with non-Indian users to include any water "required to be delivered by the Secretary through the [CAP], pursuant to the Ak-Chin Water Rights Settlement Act." ¶ 5.27(d), App. J at 94a-95a.

6. The San Carlos Apache Tribe Water Rights Settlement Act. Prior to 1990, the Secretary appeared to recognize that reallocation of this 33,300 acre-feet of water to a specific Indian tribe would at a minimum require an amendment to the Ak-Chin Settlement Act. See *Fort McDowell Indian Water Rights Settlement Act of 1990, Joint Hearing Before the House Comm. on Interior and Insular Affairs and the Senate Select Comm. on Indian Affairs,* 101st Cong. 40 (July 17, 1990) (statement of Timothy W. Glidden). In the early 1990s, however, the Secretary took the position that the water explicitly committed by Congress to the CAP in 1984 was not subject to existing contracts, and that he was free to reallocate that water to the San Carlos Apache Tribe, in settlement of the Tribe's water rights claims against the United States. See Central Arizona Project

(CAP) Water Allocation and Water Service Contracting; Final Reallocation Decision, 57 Fed. Reg. 4470, 4476 (Feb. 5, 1992).

Senator DeConcini, who had proposed the relevant language of the Ak-Chin Settlement Act in 1984, disagreed, as did the non-Indian agricultural users who had contracted to receive the pool of water into which the Secretary was now dipping. Thus, Senator DeConcini initially refused to support any San Carlos Apache settlement that relied upon that 33,300 acre-feet of water, unless the settlement included compensation for the non-Indian agricultural users. Ultimately, Senator DeConcini negotiated a compromise which confirmed the settlement with the San Carlos Apache, but gave non-Indian agricultural users the right to sue the government for damages for breach of their contracts, rather than providing the damage remedy directly. 138 Cong. Rec. S169596 (daily ed. Oct. 5, 1992). This compromise was adopted, and the San Carlos Apache Tribe Water Rights Settlement Act of 1992 ("SCAT Act") was enacted on October 30, 1992. Section 3708(f) gave the district court authority to entertain any "claim . . . filed within two years of the date of enactment of this Act . . . that the reallocation of water to the Tribe . . . has unlawfully deprived . . . contractors of CAP water of legal rights to such water." App. G at 58a-59a.

7. The District Court Decision. On October 28, 1994, the Districts brought suit in the district court below pursuant to § 3708(f) of the SCAT Act. On cross motions for summary judgment, the district court ruled in favor of the Districts on the issue of liability. First, the court recognized that "[i]f . . . the [33,300 acre-feet of] Ak-Chin surplus water was statutorily allocated to the general CAP supply then the water was automatically committed by the Secretary's prior allocations and contracts to the Districts and other CAP users." App. C at 35a. The court then set about determining whether the Ak-Chin

Settlement Act had in fact committed the disputed water to the general CAP supply, or whether, as the Secretary argued, the Act had given him unfettered discretion to allocate the water to "any CAP user."

In this regard, the court recognized that the relevant language of the Act, which requires the Secretary to allocate the water disputed here "to the CAP," had been included and enacted in settlement of conflicting claims to the unused Yuma-Mesa water that the Act committed to the Ak-Chin community. App. C at 26a-28a. Thus, "[u]nder the Ak-Chin Settlement Act, the CAP's disputed rights to 50,000 acre-feet were converted into settled rights to 33,300 acre-feet in a normal year." *Id.* at 38a. In addition, the court noted that "within the context of [the] CAP each of the allottees receives the amount that was allotted to [it] pursuant to the 1983 Allocation Decision and subsequent delivery contracts." *Id.* In this context, the court concluded that in committing water to "the CAP," the Ak-Chin Settlement Act had explicitly provided that that water would be subject to the Secretary's 1983 Allocation Decision and the implementing contracts: "The Ak-Chin Settlement Act's requirement that the Secretary allocate the excess water to the CAP could not mean that the Secretary may allocate the water to any CAP user but, instead, that he may allocate the water to the CAP general pool, according to the previously established allocations and delivery contracts." *Id.* at 40a.

After concluding that the water relinquished by the Ak-Chin had been committed to the general CAP pool, the district court addressed the more specific issue of whether reallocating that water to the San Carlos Apache deprived the Districts of any contractual property right. In that regard, the court noted that the Districts had contracted to receive 43% of the residual CAP pool, which "is made up of water not required for delivery pursuant to the allotment contracts of the other CAP users of

higher priority." *Id.* at 38a-39a. Although "the Districts' pool 'existed only at the mercy of the prior demands of the Indians and M&I users,'" the district court recognized that "these demands are limited to the amount allocated to them in the Secretary's 1983 Allocation Decision and confirmed in contracts." *Id.* at 46a (citation omitted). Thus, the district court concluded, "Removing water specifically allotted to the CAP general supply to settle [additional] claims of one user is tantamount to increasing that user's allotment with water already contracted for by another user." *Id.*

Accordingly, the district court determined that the government had breached the Districts' contracts and taken their property without just compensation when Congress, at the Secretary's request, reduced the CAP supply available to M&I and non-Indian agricultural users by committing an additional 33,300 acre-feet of CAP water annually to the San Carlos Apache.

8. The Ninth Circuit Decision. The Ninth Circuit reversed. The court of appeals concluded that the petitioners did not have a property interest in the water the Secretary had reallocated, and that any breach of contract or 5th Amendment takings claim must necessarily fail. Basing its decision primarily on § 2(k) of the Ak-Chin Settlement Act, virtually without reference either to the context or history of that provision, or to the existing CAP structure and the place the Districts' contracts occupy in that structure, the court of appeals held that because the language of the Ak-Chin Settlement Act did not specify that the water should be allocated to the non-Indian agricultural pool or to any particular user, the Act did not give the Districts any right to the reallocated water. App. A at 14a.

In addition, the court concluded that ¶ 8.12 of the Master Repayment Contract, which provides that the government will

not be liable for a failure to deliver water "for any cause whatsoever including, but not limited to, drought, delay in the construction of the Navajo Project, the failure of the Navajo Project to be completed, or the lack of power for pumping," absolved the government of any liability for failure to deliver water to the Districts. The district court had concluded that while under ¶ 8.12 the government would not be "liable if there is a shortage of water available to [the] CAP as a whole," the Districts nonetheless "did not bear the risk that the Secretary would remove water from the general CAP pool to satisfy one of its independent obligations," App. C at 40a. The court of appeals, however, relying on its own opinion in *O'Neill v. United States*, 50 F.3d 677 (1995), interpreted this clause -- a version of which "appear[s] in the Secretary's reclamation contracts with high consistency" -- to excuse performance where the government simply decides to provide the water at issue to another party. See Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 Va. Envtl. L.J. 363, 394 & n.179 (1997); App. A at 20a-21a.

Finally, again relying on its own decision in *O'Neill*, and without citation to this Court's subsequent decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), the court held that neither the Secretary's contracts nor the Ak-Chin Settlement Act relinquished the government's (presumed) authority to reallocate Colorado River water in "unmistakable terms." *Id.* Thus, the court held that both the contracts and the Act remained subject to later legislation, including legislation such as the SCAT that simply reallocated water committed under the Secretary's pre-existing contracts to a different party, and that the government was not liable for damages. *Id.*

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES ISSUES OF GREAT IMPORTANCE CONCERNING THE SECRETARY'S AUTHORITY UNDER § 5 OF THE BOULDER CANYON PROJECT ACT TO ALLOCATE COLORADO RIVER WATER.

A. The Scope of the Secretary's Authority to Reallocate and Transfer Rights to Colorado River Water Has Become Critically Important.

In *Arizona v. California*, 373 U.S. 546, 579-80 (1963), this Court held that in § 5 of the BCPA Congress had conferred upon the Secretary unprecedented authority to allocate the waters of the Colorado River among the States of Arizona, California, and Nevada, as well as to individual users within those states, without regard to state law.[9] This case presents the Court with its first opportunity to articulate further the contours of that authority. The scope and effect of this unique authority under the century-old federal Reclamation Law is the subject of growing controversy and threatened litigation as the water demands in the three states, including long-dormant Indian needs, increasingly press against a limited Colorado River supply.[10] The important issues presented in this petition require

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[9]For background concerning the Reclamation Act of 1902, 43 U.S.C. §§ 1372 *et seq.*; and the ways in which the Secretary's § 5 allocation authority differs from his authority under that Act, see *California v. United States*, 438 U.S. 645 (1978).

[10]California is currently exceeding its normal annual apportionment under the *Arizona v. California* decree of 4.4 million acre-feet by about 800,000 acre-feet, Arizona is using almost all of its 2.8 annual apportionment, and Nevada will exhaust its 300,000 acre-feet annual apportionment in about seven years. *Living Within California's Annual Colorado River Apportionment*, Third Quarterly Progress Report to the Joint Legislative

(continued...)

resolution as these states attempt to address critical shortages by increasing emphasis on conservation, transfers of water from agricultural to urban users, and water "banking," *id.* at 1-7, while the federal government attempts to honor long-ignored trust obligations to Indian tribes. These issues should be resolved in the context of this Court's recognition that "[c]ertainty of rights is particularly important with respect to water rights in the Western United States." *Arizona v. California*, 460 U.S. 605, 620 (1983). As the current Secretary has repeatedly emphasized, the parameters of § 5 contractual entitlements must be defined in order to provide the certainty needed to find solutions to the growing water supply problems facing the lower Colorado River Basin.[11]

The problem is of critical importance in Arizona, where several more proposed Indian water settlements involving substantial quantities of water, some of which may come from the CAP supply, are under negotiation. If the Ninth Circuit's decision stands, the Secretary's § 5 contracts will not be worth the paper on which they are printed, and Congress may find it attractive to shift additional portions of the economic burden of the national trust obligation to Arizona's Indian tribes from the nation's taxpayers to non-Indian agricultural users in Arizona, as the court of appeals did in this case.

Similar questions about the scope and effect of the Secretary's § 5 California allocations are brewing in that state. There the Secretary allocated all of California's annual

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[10](...continued)
Budget Committee of the California Legislature from the Colorado River Board of California (Apr. 1998) at 1 (hereafter "CRB Report").

[11]See, *e.g.*, Address by Secretary of the Interior Bruce Babbitt before the 1997 Annual Conference of the Colorado River Water Users Association in Las Vegas, Nevada (Dec. 18, 1997) at 3.

apportionment from the Colorado River to individual agencies by regulations and implementing contracts in the early 1930s.[12] Those allocations, however, did not include water for the Fort Mojave, Colorado River, and Chemehuevi Indian tribes and miscellaneous non-Indian users which this Court later determined in *Arizona v. California* held "present perfected rights" to water chargeable against California's annual apportionment. 439 U.S. 419, 429-35 (1979). Not surprisingly, the issue of how to integrate those omitted rights into the Secretary's California allocations is currently the subject of intense discussion. CRB Report, Attachment I at 2, 4.

As demonstrated below, the court of appeals' decision threatens the lower Basin's ability to deal with these important issues concerning the allocation and use of the limited supply of Colorado River water by holding that the Secretary possesses virtually complete authority to reallocate water in derogation of his own allocation decisions and contracts, without compensating those parties whose contractual rights are breached by the reallocation.

B. The Ninth Circuit's Decision Gives The Secretary Virtually Unfettered Discretion to Revoke Settled Rights Under His Own Pre-existing Allocation Decisions And Contracts, And Creates a Remarkable Precedent Warranting Review And Correction by This Court.

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[12] *See* R. L. Wilbur & N. Ely, The Hoover Dam Documents, H.R. Doc. No. 80-717, at A487, A491, A507, A595, A633 (1948).

1. *The Court of Appeals Held That the Secretary's Broad § 5 Allocation Authority Includes the Authority to Reallocate Contracted-For Water Without Compensation.*

Perhaps the most remarkable aspect of the court of appeals' decision is its bald assertion that "the Secretary retained his discretion [under § 5] to allocate and reallocate CAP water under the 1983 notice and under [the Districts'] subcontracts with the CAWCD." App. A at 18a. This statement underlies the court's entire opinion. Most strikingly, the court of appeals concluded that even if the Districts did enjoy an interest in the relinquished Ak-Chin water, to prove that they were entitled to that water "the Districts must prove that Congress [in the Ak-Chin Settlement Act] eliminated the Secretary's discretion to reallocate the excess Ak-Chin water." *Id.* The court thus assumed, as a necessary predicate to its analysis and ultimate conclusion, that the Secretary *has* the authority to reallocate the water purportedly committed under the 1983 Allocation Decision and subsequent contracts, which could only have been curbed if Congress had explicitly done so in the Ak-Chin Settlement Act. In other words, under the court of appeals' decision, the Secretary's authority under the BCPA to allocate Colorado River water is not limited by the contracts into which he enters.[13]

This remarkable view of the Secretary's § 5 authority also underlies the court's view of the Districts' contracts. As the

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[13]The court of appeals states that the Districts "do not seriously dispute that the Secretary retained his discretion to allocate and reallocate CAP water under the 1983 notice and under their subcontracts with the CAWCD." App. A at 18a n.17. This statement is nothing short of astonishing. The Districts most certainly did -- and do -- contest the proposition that the Secretary retained the authority to reallocate water committed under their contracts; indeed, that is the central issue of this suit.

court of appeals recognized, the Districts argued that "their property interest in the excess Ak-Chin water springs from both their 1983 subcontracts with the CAWCD, and from the Ak-Chin Settlement Act." App. A at 12a. Yet, the court concluded that the Districts had no property interest in the relinquished Ak-Chin water without ever construing the Districts' subcontracts (or the 1983 Allocation Decision upon which they were based) to determine what effect they had -- and what rights they conferred -- to water committed to "the Central Arizona Project." Rather, the court stated that the legitimacy of the Districts' claim to the water disputed here "depends upon [the court's] construction of the Ak-Chin Settlement Act," and denied the Districts' claims based solely on the language of that Act. *Id.* at 13a. Thus, the court of appeals necessarily held that the Districts could not have held an enduring property right through their contracts.

This decision, that the Secretary retains authority under the BCPA to reallocate even contracted-for allocations without compensation, is a truly radical development in federal reclamation law generally and the BCPA in particular, which if allowed to stand, has broad and troubling implications for all who have come to depend on the water they receive pursuant to the Secretary's water delivery contracts.

2. *The Court of Appeals Held That A Broad Disclaimer Clause in the Secretary's Master Repayment Contract With CAWCD Absolves the Government of Liability Under the Subcontracts When It Provides that Same Water To Another User.*

Reinforcing its extraordinary view of the Secretary's § 5 authority to "allocate [, contract] and reallocate" Colorado River water, the court of appeals held that ¶ 8.12 of the Secretary's

Master Repayment Contract with the CAWCD also absolved the government from liability to the Districts in this case. That provision states:

> "*No Guarantee of Availability of Water.* The United States assumes no responsibility with respect to the quantity of water available for delivery pursuant to this contract. In no event shall the United States . . . be liable for any damages . . . arising out of or in any way connected with any suspension or reduction in the delivery of water pursuant to this contract or with any shortage in the quantity of water available for delivery hereunder or to any subcontractor for any cause whatsoever including, but not limited to, drought, delay in the construction of the Navajo Project, the failure of the Navajo Project to be completed, or the lack of power for pumping."

App. J at 95a.

At the outset, we note that despite its "for any cause whatsoever" language, the court of appeals' interpretation of this provision is hardly the most reasonable one. Rather, the language and context of the provision appear plainly to indicate that the parties intended to absolve the government from liability for water non-delivery due to forces beyond its control or other practical considerations unrelated to allocation decisions. The section is specifically addressed to the "availability" of water for delivery, and to the government's desire to avoid making any guarantees "with respect to the quantity of water available for delivery" in the arid west. *Id.* Moreover, the specific examples given of "suspension[s]," "reduction[s]," or "shortage[s]" for which the government will not be liable all involve causes far removed from allocation

policy: "drought, delay in the construction of the Navajo [Power] Project, the failure of the Navajo Project to be completed, or the lack of power for pumping." Although admittedly that list does not purport to be exclusive, the common theme, coupled with the clause's focus on the "availability" of water, compels the conclusion that this clause was intended to absolve the government from liability for shortages or reductions in the manner of a typical *force majeure* clause. Thus, as the district court held, under this provision the Districts "did not bear the risk that the Secretary would remove water . . . to satisfy one of its independent obligations." App. C at 40a.

This interpretation of ¶ 8.12 is further confirmed by ¶¶ 4.1 and 4.4(b)(i) of the Districts' subcontracts, which obligate the Secretary to "use all reasonable diligence to make available to the [Districts] the quantity of Project Water [requested by the Districts]," and to "use his best efforts to maximize the availability and delivery of Arizona's full entitlement of Colorado River water over the term of this subcontract." *Id.* These explicit obligations preclude a finding that ¶ 8.12 of the Master Repayment Contract should be interpreted to excuse the government from making *any* effort to comply with its obligations, and indeed to sanction the government's deliberate efforts to frustrate the Districts' contracts. Cf., *Orange Cove Irrigation Dist. v. United States*, 28 Fed. Cl. 790, 800 (1993).

Through its strained interpretation of the Secretary's Master Repayment Contract, the court of appeals has apparently given the Secretary *carte blanche* to relieve the government of any liability -- or any actual obligations -- under its water supply contracts. This is a development with very broad impact: the decision obviously will affect all other Arizona subcontracts held by municipal, industrial, and non-Indian agricultural users with rights to CAP water. In addition, because provisions similar to ¶ 12.8 are common to reclamation contracts through-

out the West, see Benson, 16 Va. Envtl. L.J. at 394 & n.179, this aspect of the court of appeals' decision will potentially impact many of the 2,700 other "major" reclamation water delivery and repayment contracts.[14]

3. The Court of Appeals Fundamentally Misconstrued The Ak-Chin Settlement Act, and Thus Deprived Arizona Municipal, Industrial, and Non-Indian Agricultural Users of Water Previously Committed to Them Under Their Contracts Without Compensation.

The court of appeals, before reaching the broader issues concerning the Secretary's allocation authority under § 5 of the BCPA and the impact of his allocations and water supply contracts, held that the Districts did not have a protected property interest in the water reallocated to the San Carlos Apache because "the Ak-Chin Settlement Act conferred upon them no protectable property interest." App. A at 12a. In reaching this conclusion, the court misconstrued the Ak-Chin Settlement Act and thereby deprived the Districts, as well as all other municipal, industrial, and non-Indian agricultural CAP users in central Arizona, of important rights under their contracts.

As discussed above, the relevant language of the Act was proposed by Senators Goldwater and DeConcini in order to settle a dispute between the Secretary and Arizona interests, including the Governor, two state agencies, and non-Indian M&I and agricultural users over the Secretary's right to use

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[14]There are 133 federal reclamation projects in the western United States, constructed at a cost of $21.8 billion, and 2,700 associated "major" water delivery and repayment contracts. Western Water Policy Review Advisory Commission, Water in the West: Challenge for the Next Century, at 2-9 (June 1998).

50,000 acre-feet of water for which the Yuma-Mesa district had contracted many years before, but which it had never used. The Arizona interests believed that that water was by law already included in the CAP and therefore subject to existing contracts, so that to allocate that water to the Ak-Chin would reduce the available water supply to which M&I and non-Indian agricultural users were entitled. The Secretary disagreed. See *supra*, pp. 7-9.

To settle this dispute, the Arizona Senators, who sponsored the Ak-Chin Settlement Act and brokered its compromise, included in the Act language specifying that while the Secretary would be permitted to allocate the 50,000 acre-feet of disputed Yuma-Mesa water to the Ak-Chin, he would be directed to allocate a portion of the water previously allocated to the Ak-Chin, but to which the community was no longer entitled, "to the Central Arizona Project." The Arizona non-Indian interests thus dropped their opposition to the Ak-Chin Settlement Act.[15] The history of the Ak-Chin Settlement Act is clear on this point, and indeed the government in this case has not disputed it.

Under these circumstances, as the district court found, it is inconceivable that the Act's requirement that the Secretary allocate the excess Ak-Chin water "to the Central Arizona Project" meant that the Secretary retained the discretion to allocate that water for the exclusive use of an Indian tribe -- or, for that matter, to any other individual user. It was the Secretary's intent to reduce the amounts committed to non-Indian users under their contracts by 50,000 acre-feet that

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[15]See *e.g.*, 130 Cong. Rec. S26714 (daily ed. Sept. 25, 1984) (statement of Sen. DeConcini) (included in the record below in the Appellant's Excerpt of Record at 129) ("The . . . amendment clarifies . . . that any water that is not utilized by the Ak-Chin community will revert to the State for use by its CAP customers."); *supra*, pp. 8-9.

sparked the conflict in the first place, and so under the Secretary's interpretation, these users agreed to settle their claims to this water for nothing. This is hardly a plausible reading of the statute. Rather, as the district court held, the Ak-Chin's reference to "the Central Arizona Project" logically refers to the general CAP pool. App. C at 40a.

By committing the water to the general CAP pool, moreover, the Ak-Chin Settlement Act necessarily confirmed that the water would be subject to the 1983 Allocation Decision and the Arizona users' contracts. As described above, the Secretary declared in his 1983 Allocation Decision that he had "elected to allocate waters developed by the . . . (CAP) . . . for the delivery of Arizona's *remaining entitlement* to Colorado River water." App. H at 61a (emphasis added). His allocations thus explicitly included all of the Colorado River water to which Arizona users are entitled under the BCPA, less any amounts that had already been developed, or harnessed and put to use, and which had not then been "developed by the . . . (CAP)." *Id.* The CAP pool thus had been fully allocated in 1983.

Based on the State of Arizona's recommendations with respect to non-Indian users and his own determinations of individual tribal requirements, the Secretary purported to give specific entities the right to contract for concrete water rights: he made specific individual allocations to twelve Indian tribes or communities, similar specific allocations to eighty-five M&I users, and specified percentages of *all remaining supplies* to non-Indian agricultural users. App. H at 71a. The Secretary's Allocation Decision stated that the amount of water that would be made available to the non-Indian agricultural users from the CAP would include (1) the portion of the CAP supply not allocated to Indians and M&I users and (2) the unused portions of those senior allocations. App. H at 80a.

The Secretary then entered into contracts with the individual entities within the three allocation categories. Based on those contractual rights, since 1985 CAP water has been delivered to Arizona users, including the Districts, and put to reasonable beneficial use.[16] Not having reserved any authority to further amend the 1983 allocations on which the Districts' contracts were based,[17] the Secretary was no longer able to increase the higher priority users' allocations, and thus upset the priority expectations created by the Allocation Decision and implementing contracts, without breaching his express contractual commitments, as well as his implied obligation of good faith and fair dealing. See, *e.g.*, *Orange Cove*, 28 Fed. Cl. at 800.

It is clear, then, that if the water relinquished by the Ak-Chin was part of the CAP, it, like the rest of the CAP pool, was irrevocably committed under the 1983 Allocation Decision and implementing contracts. The Districts and other Arizona users believed, of course, that that water *was* part of the CAP and subject to their contracts -- even in the absence of the Ak-Chin Settlement Act. However, that Act removed any doubt that there may have been, by expressly stating -- in settlement of an identical dispute over the Yuma-Mesa water -- that the "Secretary shall allocate [the water relinquished by the Ak-

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[16]The CAP facilities were not fully completed until 1993. Prior to that time, the Districts were taking as much of their contract entitlements as they could get through interim delivery arrangements with the Secretary.

[17]The Secretary retained the authority to further allocate any of the proposed allocations that were not contracted for, App. H at 62a, and in fact, the Secretary subsequently carried out a second round of allocations for the uncontracted-for percentages of the non-Indian agricultural pool. See 57 Fed. Reg. 4470 (1992). The Secretary also retained jurisdiction over any unused contractual entitlements until such time as they were needed by the contractors. App. H at 64a. He did not otherwise reserve any authority to amend the allocations, however.

Chin] on an interim basis to the Central Arizona Project." § 2(k), 98 Stat. 2701, App. F at 57a.[18] The Secretary and the CAWCD then further confirmed this interpretation of the Ak-Chin Settlement Act by amending the Master Repayment Contract in 1988 to specify that the "Project water" delivered to non-Indian subcontractors pursuant to the Secretary's 1983 allocations and implementing contracts includes the water relinquished by the Ak-Chin. App. J at 94a-95a.

Because it misinterpreted the Ak-Chin Settlement Act to permit the Secretary to allocate the excess Ak-Chin water to any "CAP user" rather than "to the CAP," the court of appeals allowed the Secretary to remove a significant amount of water -- 33,300 acre-feet -- from the pool expressly committed, through their respective contracts, to M&I and non-Indian agricultural users, and commit it instead to an Indian tribe outside the established priorities without compensation. This error thus has a significant impact, directly affecting the water rights of all

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[18]Although this is not the focus of its decision, the court of appeals seemed to believe that the Act's use of the word "interim" supported its view that the government was free to revoke its allocation of water to the CAP. See App. A at 19a. In the context of western water law and rights, however, allocations are sometimes described as "interim," meaning only that the allottee or user does not have an absolute entitlement to a specific quantity of water simply because it may have received that quantity in an earlier year. For example, junior water users are entitled to use senior unused water on an interim, nonpermanent basis until it can be put to use by the senior users. This linchpin of western "prior appropriation" water allocation systems promotes the most efficient use of a limited water supply. See, *e.g.*, App. H at 64a, 71a-72a, 72a. (Secretary retained right to contract for sales "on an interim basis where . . . water allottees are not utilizing the full CAP allotment . . ."). In this case, the allocation to the CAP had to be "on an interim basis," because in dry years some or all of that 33,300 acre-foot allocation might be required for delivery to the Ak-Chin. The word does *not* mean that the allocation itself -- the right to use water when available -- can be revoked, as the court of appeals apparently assumed.

non-Indian CAP users -- cities, towns, major industries, and agricultural producers -- in Arizona.[19] Moreover, the precedent will haunt future Indian water rights settlements in Arizona and elsewhere in the West.

II. THE NINTH CIRCUIT'S USE OF THE "UNMISTAKABILITY DOCTRINE" DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN *UNITED STATES V. WINSTAR CORP.*

Relying exclusively on Ninth Circuit precedent decided prior to this Court's 1996 opinion in *United States v. Winstar Corp.*, 518 U.S. 839, the court of appeals held that the Districts could not prove that they had a property right to the water committed to the CAP in the Ak-Chin Settlement Act unless they proved that Congress in that statute had eliminated both the Secretary's and its own discretion to reallocate that water in "unmistakable terms": "Because we are wary of constructions that would give government contracts the force of indelible laws, we assume that '[t]he sovereign's power to enact subsequent legislation affecting its own contractual arrangements endures . . . unless surrendered in unmistakable terms.'" App. A at 18a, 19a (citation omitted).

Thus, the court of appeals ignored traditional principles of contract interpretation, under which the district court had concluded that the government had indeed committed to allocate the water disputed here to the general CAP pool for use under its existing allocations and contracts. Instead, the court of appeals, assuming for discussion purposes the correctness of

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[19]Although the M&I users' specific, quantified allocations have not been reduced, increasing the San Carlos Apache allocation affects their contracts by making it less likely that the water will be available to fully satisfy their contractual allocations. In a dry year, it is these users that will suffer the effects of the court of appeals' decision.

that interpretation, nevertheless held that neither the language of the Ak-Chin Settlement Act nor the Districts' contracts "unmistakably" committed the government to that allocation and that therefore both the Secretary and Congress were free to reallocate that water at any time. *Id.* at 20a-21a.[20]

The court of appeals' use of the "unmistakability doctrine" in this way -- and its resulting conclusion that the government may simply walk away from its commitment to allocate water to Arizona users under the CAP structure -- directly conflicts with this Court's *Winstar* decision. In *Winstar*, a majority of this Court unequivocally held that the government's contractual promises are to be analyzed and discerned using ordinary principles of contract interpretation, and that the "unmistakability doctrine" does not require a "second promise" not to breach its contractual agreement before the government may be held liable in damages for breaching a promise so discerned. See *Winstar*, 518 U.S. at 887. Thus, in *Winstar* this Court held that the government was liable to three savings and loan associations ("thrifts") for breaching its promise to accord them particular accounting treatment in connection with their acquisition of other, failing thrifts in the early 1980s, despite the fact that the contracts did not explicitly state that the government would not thereafter change the accounting regulations applicable to thrifts.

The principal *Winstar* opinion, authored by Justice Souter, held that the "application of the [unmistability] doctrine . . . turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government." *Id.* at 878. Because in *Winstar* the thrifts were

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[20]As the court of appeals recognized, Congress can make contractual commitments to private parties through legislation. See *Dodge v. Board of Education*, 302 U.S. 74, 78-79 (1937).

not seeking to enjoin the issuance or application of the new regulations, the principal opinion held that the doctrine did not apply. It also stressed that inappropriate use of the doctrine would be "at odds with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies" and cited as an example the type of contract at issue here: "contracts to dispose of federal property." *Id.* at 883, 884.[21]

Justice Scalia's concurring opinion reasoned that the "unmistakability doctrine" did apply to the case, but that "the doctrine has little if any independent legal force beyond what would be dictated by normal principles of contract interpretation." *Id.* at 920. Because "the special role of the agencies, and the terms and circumstances of the transactions, provide[d] an adequate basis" for the lower courts' findings that the government had promised to provide the thrifts with particular regulatory treatment in that case, the concurring opinion also concluded that the unmistakability doctrine did not absolve the government from liability. *Id.*

In flat disobedience to both the principal and concurring opinions in *Winstar*, which it did not cite, the court of appeals in this case held (1) that the "unmistakability doctrine" does apply to the government's contractual commitments to provide water to the Districts, and (2) that the doctrine substitutes for "normal principles of contract interpretation" a requirement that to be held to a promise, the government must explicitly state that it will not later change its mind. Thus, the court declared that even if the water surrendered by the Ak-Chin had been allocated and committed to the Districts under their contracts

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[21]Indeed, the principal opinion in *Winstar* identified a "supply contract" as one to which "no one would seriously contend that . . . the unmistakability doctrine [might apply]." *Id.* at 880.

and the Ak-Chin Settlement Act, it could find nothing that "purport[ed] to limit Congress's power to command a reallocation later." App. A at 20a.

First, as in *Winstar*, enforcement of the government's trust obligations to the San Carlos Apache tribe will not be blocked by requiring the government to compensate the Districts for taking their water to satisfy that obligation. Second, as discussed above, the facts and circumstances surrounding the 1983 Allocation Decision and implementing contracts, as well as the Ak-Chin Settlement Act, make plain that the water surrendered by the Ak-Chin "to the Central Arizona Project" was committed to the Districts and other Arizona CAP users under the existing CAP allocations and contracts. As in *Winstar*, if the government had promised only to commit that water to the CAP "'unless and until there [was] subsequent [inconsistent] action,'" then the government's commitment to the Districts in the contracts and the Ak-Chin Settlement Act was "an absolutely classic description of an illusory promise." *Winstar*, 518 U.S. at 921. But as Justice Scalia stated, "[i]n these circumstances, it is unmistakably clear that the promise . . . must be understood as (unsurprisingly) a *promise* . . . [U]nmistakability [does not] demand[] that there be a *further* promise not to go back on the promise . . . ." *Id.*

As a result of its failure to consider this Court's *Winstar* decision, as well as its importation of the "unmistakability doctrine" into an analysis of whether the government may be held to an ordinary promise to supply goods -- here, water -- the court of appeals held that the government may indeed make "illusory promises." Given the leading role that the court of appeals' decision in this case is likely to play, at least in the development of the law governing the Secretary's thousands of water supply contracts throughout the West, if not in Ninth Circuit government-contract law generally, it is a dangerous precedent warranting correction by this Court.

CONCLUSION

For all these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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